

Restore the Delta
PO Box 691088
Stockton, CA 95269

March 23, 2011

Terry Macaulay

Deputy Executive Officer
Delta Stewardship Council
980 Ninth Street, Suite 1500 Sacramento, CA 95814
(916) 445-5825
terry.macaulay@deltacouncil.ca.gov

Dear Mr. Macaulay:

Below you will find comments from Restore the Delta in response to the second draft of the Delta Plan.

Thus far, Restore the Delta is disappointed in the overall content. We find it disheartening that the Council, which has been mandated to “protect and enhance the unique cultural, recreational, and agricultural values” of the Delta, is rolling out a plan that strips away local authority and autonomy from the people who built the Delta. We also find it frightening that requests for an examination of various conveyance and no conveyance alternatives have thus far been ignored and deferred to the Bay Delta Conservation Plan Steering Committee. Even more alarming, the Plan, thus far, allows government agencies to determine how Delta land will be acquired. This document reads like a blueprint for a State-driven land grab.

This draft asserts broad jurisdiction for the Council, while at the same time it side-steps from the problems at hand in the Delta that need real solutions.

Therefore, we respectfully submit the following concerns so that the Council will have an opportunity to resolve these issues prior to completing its final draft.

Sincerely yours,

Barbara Barrigan-Parrilla
Executive Director
Restore the Delta

Chapter 2: Science and Adaptive Management for a Changing Delta

In terms of describing adaptive management practices and the use of best possible science, this chapter describes these processes in a generic manner with great detail and accuracy. However, questions remain.

The described processes of adaptive management and the use of best possible science are to constitute the management strategy for ecosystem restoration and water management decisions. How will the findings from these processes be balanced with the Council's mission to protect and enhance "the unique cultural, recreational, natural resource and agricultural values of the Delta as an involving place"?

In addition, the people of the Delta, farmers, fishermen, levee engineers, water quality experts, and area environmentalists, are the on-the-ground observers of empirical evidence regarding the state of the Delta. Their participation is essential for the successful monitoring of performance measures that are qualitative and quantitative in design. What types of data gathering programs will be put into place for including their observations as part of the review of scientific data and the effectiveness of adaptive management practices? (Page 12 – Chapter 2)

Chapter 3: Governance Plan to Support Coequal Goals

While Restore the Delta has always maintained, and will continue to maintain, that the notion of "co-equal goals" for managing the Delta (restoring the ecosystem and securing water supply reliability) is a logical fallacy, we will hold our comments to a review of the implementation of governance to support the implementation of "co-equal goals."

Submissions of Certification for Proposed Covered Actions:

The described process for state and local agencies proposing to carry out, approve, or fund a covered action is without a doubt one of the most restrictive and intrusive government code sections ever written. It exemplifies the type of big government intrusion into the rights of landowners, local government agencies, and individuals that is abhorred by voters on both sides of the political aisle.

Turning first to the clarity of the document at hand, in this second draft of Chapter 3, there is a problem with definitions. While covered actions are listed in the legislation authorizing the Delta Plan, for definition purposes, covered actions need to be reiterated in the beginning of the discussion of certification of proposed covered actions.

In terms of content, we find it highly disturbing that reclamation districts, water agencies, and Delta municipalities will have to prove how their decisions for local improvements will comply with "all government policies related to water diversion and use, water quality, ecosystem function, species protection, and land use." As described in this draft, the certification of proposed covered actions will force small reclamation districts to document how levee maintenance, pump maintenance, irrigation

and drainage operations, will comply with adaptive management planning and best available science practices in relation to ecosystem function. These actions are part of on-going daily maintenance of the Delta. How often will these actions have to be reported, to whom, and in what form?

Holding small local government entities to the same submission standard as the State Water Project, the Central Valley Project, or even in-Delta municipal dischargers, is an unjust application of rules and regulations, as these entities do not have the capacity to comply with these required submission requirements. It is our belief that, separate sets of submission requirements should be created for water exporters, in-Delta and upstream municipal dischargers, and in-Delta agencies. Otherwise, the governance of covered actions by the Delta Stewardship Council will become nothing more than another layer of ineffective bureaucratic management, rendering the people of the Delta unable to maintain and protect the system that they built.

Last, at the local level there will be covered actions for Delta maintenance that will enhance and protect the Delta's ecosystem and that will protect the agricultural values of the Delta as an evolving place. These actions, however, may have little to do with the goal of providing a more reliable water supply. Will such actions be deemed inconsistent even if they are necessary for "protecting and enhancing the unique cultural, recreational, and agricultural values of the California Delta as an evolving place."?

Chapter 4: Manage Water Resources

The Delta Plan recommends that:

WR R1 "The involved federal, State, and local agencies complete the Bay Delta Conservation Plan (BDCP) process no later than December 31, 2014....[if] the BDCP process is not complete by this date, the Council will proceed with ecosystem and conveyance planning recommendations needed to achieve the coequal goals, for inclusion in the first five-year update of the Delta Plan."

Restore the Delta has been involved in scoping comments made by the Environmental Water Caucus to the Delta Stewardship Council and in comment responses to the first draft of the Delta Plan.

Repeatedly, the environmental community has called for an evaluation of a no conveyance alternative within the Delta Plan. If the Council is willing to wait for BDCP results for an additional three years, the Council should require the BDCP to evaluate the following:

- a no conveyance alternative
- a 3000 cfs pipe as promoted by the Planning and Conservation League
- a Western Delta conveyance alternative as recommended by Dr. Robert Pyke

While Restore the Delta supports a no conveyance alternative, we recognize that in a State driven process all ideas must be examined. Without a full and detailed evaluation of all conveyance ideas presently in circulation, the Delta Stewardship Council will end up doing nothing more than rubber stamping the conveyance recommendation made by the BDCP after a three-year waiting period.

In addition, we support the comments being submitted by the Environmental Water Caucus regarding water resources management throughout the Delta watershed.

Chapter 5: Ecosystem Restoration

ER P2 –Habitat Restoration shall implement the Reasonable and Prudent Alternative action (RPAs) contained in those biological opinions unless...

New biological opinions supersede and replace these opinions, in which case those opinions will replace those named above.

Unfortunately, as demonstrated over the last eight years, biological opinions can be subject to political manipulation within NMFS. On the other hand, biological opinions could also be made more restrictive in regard to how much water can be taken from the Delta in a given ecological crisis. Restore the Delta recommends a minimum biological standard such as what was set in the 2008 biological opinions until Delta Smelt, Salmon, and other threatened species are well on their way to recovery.

ER R4 The Wildlife Conservation Board and Delta Conservancy as co lead agencies, in coordination with the Department of Water Resources, Department of Fish and Game, and other State and local agencies, should develop by XXX a plan and protocol for acquiring the land necessary to achieve ecosystem restoration consistent with the coequal goals and the Draft ERPCS.

Restore the Delta finds it alarming that in this recommendation State agencies are taking the lead with the Department of Water Resources to create a protocol and plan for acquiring Delta land. Delta landowners, not simply representatives from the five Delta counties, should be at the table to participate in the creation of this protocol and process to ensure that it does not become a land grab.

Restore the Delta is vehemently opposed to the governmental taking of lands for the use of habitat restoration or mitigation for past or future project operations. We believe that Delta communities are as deserving of protection as Delta fisheries. We maintain that the best plan for the Delta is the creation of a world class region where profitable, sustainable agriculture and habitat thrive together. The Delta holds the blueprint for sustainability within its past and its future.

Government agencies and other non-governmental agencies involved in the "Delta planning industry" bring nothing but economic harm to the Delta community through the planning processes by listing targets for taking 100,000 acres of Delta farmland out of production.

We recommend to the DSC and other governmental agencies that existing state lands (about 60,000 acres) be used first for wetlands habitat for fisheries. In addition, we find much merit in Dr. Robert Pyke's idea that sunken islands like Frank's Tract should be restored for fish habitat purposes.

Beyond those efforts, which would go a long way toward creating habitat, Restore the Delta believes that opportunities exist over time for habitat creation as part of upgraded levees. It seems that most other countries in the world have figured out how to put habitat on secure levee banks along rivers; we should be able to do the same. And if local farmers voluntarily make land sacrifices for habitat creation on their levees or elsewhere, they should be compensated.

ER R5 The Delta Conservancy Strategic Plan should

Develop and adopt criteria for prioritization and integration of large-scale ecosystem restoration in the Delta, with economic sustainability and use of best available science as foundation principles.

Develop and adopt methods and processes for ownership and long-term operations and management of restored and/or conserved land in the Delta and Suisun Marsh.

Recommend sources for long-term financing for programs and project that include covering costs of long term operations and management and “Payment in Lieu of Taxes.”

Restore the Delta feels that in these recommendations the economic viability of the Delta region is being given little consideration. While large scale ecosystem restoration is to be informed by some principle of economic sustainability, it falls short in its discussion of what new streams of revenue would look like for the five Delta counties, which would lose significant portions of taxable farmland.

Payment in lieu of taxes is not a guaranteed source of adequate income for Delta Counties, which will be making the bulk of the sacrifices for the Delta Plan and Bay Delta Conservation Plan as proposed. In San Joaquin County alone, Delta agriculture constitutes one-third of the County’s annual multi-billion dollar agricultural economy.

As seen in the current State budget negotiations process, everything from schools to Medicaid, to redevelopment money for city entities, is subject to funding cuts. There is no mechanism for the State to guarantee that payment in lieu of taxes will be adequately funded now or in the future.

Furthermore, in the language of this recommendation found in Chapter 8 of this document, there is no description of what is considered a reasonable calculation, or any discussion of how long payments will be made to the Delta Counties.

Thus, payment in lieu of taxes is not an adequate income source for financial sacrifices made by the five Delta Counties, nor does this strategy adequately address how the Delta in this new use of land will reach economic sustainability.

Chapter 6: Improve Water Quality

Restore the Delta supports comments made by the California Sportsfishing Protection Alliance.

Chapter 7: Reduce Delta Flood Risk to People, Property, and State Interest

Restore the Delta supports the comments made by the Environmental Water Caucus and reiterates those comments here as they inform comments made by Restore the Delta for Chapter 5 and for Chapter 8.

Restore the Delta also maintains that setback levees, which could create a place for fisheries habitat, should be further evaluated in context of flood protection as described in this section. A policy should also be added that programs, policies and projects for flood protection shall incorporate to the maximum extent feasible ecosystem restoration and sustainable agriculture.

The document appears to be an attempt to generally restrict any activities in areas described as floodplains (covered actions), which would have the effect of creating a "floating easement" over most of the Delta and many of its tributaries. It would effectively prevent any changes in the floodplain for an indefinite period, perhaps even prohibiting regular levee maintenance and improvement. Since the affected areas are broadly defined (see, for instance, the descriptions of the Consumnes/Mokelumne and San Joaquin/ South Delta "flood plains" at page 41) and undoubtedly include a lot of land not subject to inundation, unnecessary economic consequences will occur. This appears to conflict with the disclaimer about "not intended to affect the rights of any owner of property" doesn't negate the whole provision.

The Delta's various jurisdictions currently have and enforce laws restricting activities in floodplains. What we need are better descriptions of floodplains as a part of a larger Central Valley Flood Management Plan. Until such time, land uses should be examined on a case-by-case basis rather than creating one size fits all criteria severely restricting human activities.

The suggestion that the State should be completely absolved from tort liability is counterproductive since both the State and the USACE have aggravated flooding problems in the Delta by surcharging flood peaks in the Delta by upstream storm drainage and river channelization, negligent and uncoordinated reservoir storage and release operations, and failure to maintain Delta channel capacities in the face of burdensome sedimentation, often caused by water supply operations. Sharing responsibility with the various Delta beneficiaries throughout California, where appropriate, is a much sounder policy. The State can reduce its share of liability by conducting an aggressive flood management program rather than trying to shirk responsibility.

A Delta Flood Control Assessment District raises similar concerns. Unless the district was broad enough to include tributaries and governmental operations that affect Delta flooding, the burden would be shouldered entirely by the Delta landowners who currently assess themselves for levee work and who are often the victims of the activities described in the previous paragraph.

A policy should be added that planning, implementation, monitoring and evaluation shall include consultation and maximum feasible participation by those living in the Delta.

A policy should be added that programs, policies and projects for flood protection shall incorporate to the maximum extent feasible ecosystem restoration and sustainable agriculture.

RR P1: This appears to be a confused interpretation of the referenced sections. The cited sections speak in terms of flood risk. Suggest change to read: "No covered action may increase the flood risk or impair the ability to reduce flood risks in the Delta". PRC 29702 speaks generally as to protecting, maintaining, and where possible enhancing and restoring the overall quality of the delta environment, including but not limited to, agriculture, wildlife habitat, and recreational activities; assuring orderly, balanced conservation and development of delta land resources; and improving flood protection by structural and nonstructural means to ensure an increased level of public health and safety. WC 85020(g) provides: "Reduce risk to people, property, and state interests in the Delta by effective emergency preparedness, appropriate land uses and investments in flood protection." WC 85057.5(4) provides: "Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta."

RR P2: This section appears to ignore the distinction as to "portions of its uplands" referenced in the WC 29704 findings and the intended focus on the primary zone evidenced in WC29703. The burden and cost of imposing another layer of review on already developed areas in the uplands, and particularly those in the secondary zone, is huge and complex. A more narrow focus is suggested.

RR P4: The goal should be to provide the PL 84-99 levee standard as a minimum for all delta levees. A 22-foot crown width in lieu of the 16-foot crown is recommended as a means to accommodate raising levees to meet sea level rises greatly in excess of the rates experienced in the last 150 years and to allow two-way passage of trucks in the event of a flood fight. Funding allocations similar to those suggested in the attached recommended five-year plan should be used to put emphasis on what has been referred to as strategic levee investments. Due to the interrelationship of all the levee systems in terms of vulnerability to under seepage and wave action across flooded areas, all levee systems should be improved to the PL 84-99 standard while at the same time investing in higher standards for those levees considered to be particularly strategic.

Table 7-1: Class 3 with a 22-foot crown should be the minimum standard. HMP (Class 2) was never intended to be a standard, but rather was simply a mechanism to measure good faith progress of the state and locals when FEMA felt that the state was not doing its fair share. Classes 4 through 7 should have a minimum crown width of 22 ft.

RR R1: Flood insurance requirements should be a matter of statewide application but require a more studied consideration in the Delta. The greatest portion of dollar exposure is outside of the legal Delta. The federal Flood Insurance Program is limited to \$250,000.00 for a single-family dwelling and

\$500,000.00 for a commercial building. Personal property limits are respectively \$250,000.00 and \$500,000.00. The coverage has other limitations including a deduction for the value of physical depreciation. The FEMA website explains the program. The premiums are significant (\$400.00 to upwards of \$2,000.00 per year).

Ability to pay is a real challenge particularly in low to moderate-income areas. High foreclosure rates and high unemployment add to the difficulty. The funds used to pay premiums are not available to pay for the desired upgrades to the levees. Federal assistance is typically not available and requires years of costly feasibility studies just to get in line for limited funding. State assistance supported by previously approved bonds is somewhat available but requires cost sharing, a time consuming and expensive application process, cash flow uncertainty and layers of engineering inspection and inspection. Urban project levee funding starts with a 40% local share. Environmental and recreational features can be added with a lower cost share. Environmental review requires a 50% local share and is made more costly due to requirements for federal cost share eligibility and consideration of levee setbacks. A USACE section 408 permit is triggered by these requirements. The section 408 permitting also requires compliance with the USACE ETL for removal of all vegetation except approved grasses within the levee area extending 15 feet waterward of the waterside toe and 15 feet landward of the landside levee toe or berm whichever is greater. The new plan of flood control for the Central Valley, which is due in 2012, will require 200-year flood protection for urban levees by 2025.

Modification of existing dams and new dam construction may be required to achieve such protection. The \$1 billion for Folsom Dam modifications which are hoped to allow levee improvements to satisfy such requirements for some of the Sacramento area is an indication of the challenge. A careful analysis of the funding challenges and a real plan for funding the desired flood control improvements needs to be developed as a part of consideration of the mandatory flood insurance recommendation. The flood insurance requirement is related to the issue of immunity from flood related damages. Failure to achieve improved flood protection for a State system already in place is likely to negate efforts to achieve immunity. The takings clause in the United States Constitution is applicable in this case.

RR R2 & R3: Immunity should extend to both State and local entities and should be accompanied with a properly funded plan of levee improvement. The project levees, which are the backbone of urban protection, are in general recognized to suffer from deficiencies in design and construction. Locals are simply maintaining entities and clearly lack the ability to pay. The state and feds are the controlling entities. They control the system and were responsible for the design and construction of the projects including the project levees and flood bypasses. They are also in control of the regulatory process, which in significant part obstructs the locals from performing even those actions that are within their capability. What is really needed is good faith team effort by the federal, state and locals to efficiently and timely improve flood protection for the already developed areas. Designation of floodplains with acquisition of flowage easements can address new floodplain development.

RR R4: The buffer is needed and can provide open space even if limited by the USACE to grasses and walking paths. Incorporation of a single loaded street to separate development from the levee area to avoid encroachment creep should be considered. Encroachment enforcement is costly and especially difficult. Setback levees in already developed and developing areas is particularly expensive and difficult and should not be a required consideration.

RR R5: The focus should not be directed to conveyance but rather to preservation of the levee systems in the Delta which protect the lands, infrastructure, and habitat as well as water conveyance. The conflict within the state and federal agencies caused by their loyalty to the export water interests in preference over protection of the public trust and other interests is a major part of the problem. What is needed is a plan for immediate closing of levee breaks, dewatering of flooded islands, and installation of temporary barriers to help restore water quality for local and export water needs. The plan should have funding in place and be administered by local agencies in coordination with state and federal flood control and emergency response agencies. Funding should be provided in part by export water interests with a stake in Delta conveyance.

RR R6: Regarding formation of a Delta Flood Control Assessment District, further comment is reserved pending review of the draft plan. It should however be recognized that local landowners are already assessed by the local levee agencies and assessments are limited by the agricultural land ability to pay and constitutional requirements.

RR R7: Prohibiting State agencies from renewing or entering into leases on State-owned land that permit land uses that promote or contribute to subsidence on the leased land would appear to be overly specific for the Delta plan. This should be stated as a policy to encourage the use of State owned land for purposes which do not promote subsidence.

Chapter 8. Protect and Enhance the Delta.

A policy should be added that planning, implementing, monitoring, and evaluating Delta activities described in this plan shall include consultation and maximum feasible participation by those living in the Delta.

DP R2. As stated earlier in our Chapter 5 comments, payment in lieu of taxes is not a guaranteed source of adequate income for Delta Counties, which will be making the bulk of the sacrifices for the Delta Plan and Bay Delta Conservation Plan as proposed. As seen in the current State budget negotiations process, everything from schools to Medicaid, to redevelopment money for city entities, is subject to funding cuts. There is no mechanism for the State to guarantee that payment in lieu of taxes will be adequately funded now or in the future.

Furthermore, in the language of this recommendation, there is no description of what is considered a reasonable calculation, or any discussion of how long payments will be made to the Delta Counties.

Thus, payment in lieu of taxes is not considered an adequate income source for financial sacrifices made by the five Delta Counties.

DP R3. In this recommendation made by staff/consultants, discussion is left out regarding how the National Heritage Area designation should be created. According to the legislation, the Delta Protection Commission has been mandated to conduct a feasibility study, working with Delta locals, to determine if the National Heritage Area designation is something that will help sustain local Delta communities. The DPC is still in the beginning stages of this process.

Senator Feinstein has proposed legislation that would automatically award and fund the NHA designation for the Delta. Delta residents have made it clear that they vehemently oppose the designation being set from the outside. The feasibility study process that was mandated in the legislation is a process that is driven by local efforts and local input. As such, that process should be allowed to continue, and the Council should defer to the recommendations of local Delta communities.

Chapter 9: Finance Plan to Support Coequal Goals

Guiding Principles

A companion principle to “beneficiary pays” is “stressors pay.” Human activity that causes negative operational or environmental impacts should be assessed a fee to pay for mitigation costs. An example of the stressors pay approach was the Bay Delta stamp that was required in order to fish in tidal waters of the Delta and the main stem of the Sacramento and San Joaquin Rivers.

In theory, parties causing environmental harm to the Delta should be held responsible financially for damage done to the commons. However, in its application, this could become an unjust and unfair burden on Delta communities.

Delta farmers, marina owners, recreation businesses, and hundreds of numerous Delta small businesses built and maintain the Delta. What level of reporting will be necessary by local entities engaged in Delta maintenance activities to clear them of being defined as “stressors” on the Delta? And what assurances will the Delta community have that they will not be held to a “higher standard” than water exporters because they may not be directly involved in the goal of water supply reliability?

In addition, Restore the Delta maintains that environmental stressors on the Delta are exacerbated significantly by water exports. In the short term, application of this principle could be described as a double tax on in-Delta water users. First, they must deal and work with degraded environmental assets as a result of exports, and then they must pay more for their regular user actions, renamed as stressors, that without an extreme export scenario would have significantly fewer impacts on the Delta ecosystem.

2012 Water Bond Funding for BDCP

California cannot afford the 2012 Water Bond. Polling completed over the last two years shows that the majority of voters do not support the water bond. With the next round of budget cuts, it is highly unlikely that California voters will have a change of heart.

Local Government Debt

Construction expenditures might be funded by debt issued by local governments or water agencies. Depending on the type of project being financed, local entities may be able to issue debt based on their increased revenue streams or may be able to establish some type of improvement or assessment district.

Cash strapped counties in the Delta cannot take on additional debt for mandates put in place by the Delta Stewardship Council, the Delta Conservancy, the Department of Water Resources, etc.

Conservation Organizations

A variety of conservation organizations provide funds for land and water acquisition and management. The Nature Conservancy, for example has been active in the region. Nonprofit organizations (IRS code 501 (c)(3) could be created to accept tax-deductible gifts that could be operated for Delta projects and programs.

If in-Delta nonprofits are created to accept tax-deductible gifts to create and implement Delta projects and programs, then their Boards of Directors should represent the in-Delta community adequately. We suggest that such nonprofits constitute boards that contain 50% Delta residents and landowners.